IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4868 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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MOHMADHANIF NIZAMBHAI SHAIKH (LIGHTWALA)

Versus

COMMISSIONER OF POLICE

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Appearance:

1. Special Civil Application No. 4868 of 2002

MS BANNA S DUTTA for Petitioner No. 1

MR AY KOGJE, AGP for Respondent No. 1-3

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CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 02/08/2002

ORAL JUDGEMENT

1. By this petition under Article 226 of the Constitution of India, the petitioner- detenu has challenged the legality and validity of the order of

detention dated 15.4.2002 passed against him by the Commissioner of Police, Ahmedabad City, in exercise of the powers conferred on him by Section 3(2) of The Gujarat Prevention of Anti-Social Activities Act, 1985 (hereinafter referred to as the PASA Act). The petitioner has been branded as "dangerous person" within the meaning of Section 2(c) of the PASA Act.

2. The bunch of papers supplied to the detenu with the grounds of detention served on the date of execution of the order of detention, reveals that the petitioner was found involved in two serious communal riot cases being Gaekwad Haveli Police Station CR No. 39/2002 for the offences punishable under Sections 143, 147, 148, 149, 435, 436, 395 and 188 of the Indian Penal Code and Section 135(1) of the Bombay Police Act, and Gaekwad Haveli Police Station CR No. 42/2002 for the offences punishable under Sections 143, 147, 148, 149, 336, 435, 436, 395, 118 of the Indian Penal Code and Section 135(1) of the Bombay Police Act. Both the offences were registered on 1.3.2002. The petitioner has not been named in the FIR, but the facts reveal that on 1.3.2002, a huge damage and loss was inflicted on the properties in the area known as Municipal Quarters area under Gaekwad Haveli Police Station and plying mischief with fire, properties worth more than Rs. 18 lacs were destroyed in the first incident and in the second incident, properties worth around Rs. 1.72 CRORES were set on fire. One person has also lost his life, but as the death was on account of police firing, nobody is arrested for the offence punishable under Sec.302 of IPC. The petitioner was arrested in connection with both the aforesaid registered offences and he has been enlarged on bail by the competent Court. It is submitted that in reality, this is the solitary incident and after several days, the petitioner was arrested on 8.4.2002. That the detaining authority has also considered the papers of criminal cases registered against the petitioner along with other accused and so also two statements of un-named witnesses recorded on 10.4.2002. Both these witnesses were called by the detaining authority on 13.4.2002 and verification was personally recorded by the concerned authority and on 15.4.2002, the order of detention under challenge has been passed. It is submitted that the detaining authority ought not to have exercised powers under Sec.3(2) of the PASA Act in such solitary type of incidents. After Godhara massacre there were number of events of communal conflicts and the civic life had suffered a great setback. Offences considered are one of such incidents, for which the petitioner was arrested as one of the several accused. So, the petitioner cannot be

branded as a "dangerous person" or his activities cannot be equated with the activities prejudicial to the "public order", unless there is some other incriminating material is available.

4. Ms. Banna Datta, Ld. counsel appearing for petitioner has taken me through the entire memo of the petition and the order of detention is challenged on number of grounds. However, ld. counsel for the petitioner has concentrated her arguments mainly on two grounds. The first point argued by ld. counsel Ms. Datta is that the order under challenge has been passed mechanically as the sponsoring authority has placed the papers mainly based on criminal cases registered against the petitioner. The second point argued by ld. counsel for the petitioner is that the petitioner has no criminal antecedents prior to the date of offence and the cases registered against the petitioner being a solitary type of case, he could not have been branded as "dangerous person". Statements of two witnesses have been mechanically recorded and there is nothing in the statement of two un-named witnesses that the activities of the petitioner was a challenge to the maintenance of the "public order". Of course, in the alleged incidents occurred on 01.03.2002, huge loss and damage to the properties was caused, but there was a big mob on account of incidents of communal conflicts. It is rightly argued that the detaining authority ought not to have recorded satisfaction that the petitioner requires to be detained and his free movement may prejudice or disrupt the "public order". It is true that for a single offence or a dangerous act, a person can be detained. However, it is obligatory on the part of the detaining authority to get satisfied that unless the detention order is not passed, detenu would indulge in similar type of dangerous activities which would disrupt the "public order". It is submitted by ld. counsel for the petitioner that after appreciating the papers of the police case, prima facie, registered against the petitioner, the competent Court has granted bail to the petitioner. When the Criminal Court has accepted that discretion requires to be exercised and petitioner should be granted bail, then it would not be otherwise justified or proper to keep the petitioner in prison under the detention laws unless it is saisfactorily accepted that but for the preventive detention, he/she would continue to indulge in similar activities prejudicial to the "public order". Gravity of the offence as well as development of normalcy in the area where alleged incident had occurred, are both relevant facts. It is rightly submitted that this is the case wherein State of Gujarat should have revoked the

order of detention after lapse of certain period from the alleged sole incident. For short, the continued detention of the petitioner in reference to the above set of facts, is bad and illegal and so on both these counts, the continued detention of the detenu requires to be held as bad-in-law and illegal.

5.1 While enlarging the arguments on the point of "an act prejudicial to the public order", Ms. Datta has submitted that this particular alleged wrong should not be treated as an activity prejudicial to the maintenance of "public order". Of course, when the incident had occurred, it must have been affected adversely to even the tempo of life in that area and as an effort to achieve normalcy in the affected area, some drastic measures might have been thought over immediately, but at least on the date of detention i.e. 15.4.2002, the situation was very much under control and there was no need to exercise the powers under Sec.3 of the PASA Act.

5.2 The incident was a group clash and the result of mob psychology. The petitioner was, on the contrary, a victim of the situation where two different rival groups were pelting stones etc. against each other. Innocent police personnels had also sustained injuries. For the sake of arguments, it is accepted that the petitioner was present and even was found active than also on the strength of the solitary type of incidents, impugned order of detention could not have been passed. To have control over the situation, even if such order is passed, it could not have been continued beyond the date of representation. Revocation normally should follow in such cases by opting for less drastic measures. The State Government is supposed to review the situation and the order of detention in a typical social situation.

6.1 Mr. Kogje, ld. AGP has pointed out that in one of the decisions, the Apex Court has said that to inflict a knife injury is a criminal wrong but in a communal disturbance, stabbing a person may result into disruption in the normalcy and the same may give further rise in the flaring up the communal conflict. So, the authority while passing the order was justified and the subjective satisfaction recorded by the authority is appropriate and in accordance with the provisions of the PASA Act. Mr. Kogje also referred the relevant provisions of sub-section (4) of Section 3 of the PASA Act in reference to Section 2(c) of the PASA Act.

6.2 The say of ld. counsel Ms. Datta if evaluated in the correct perspective, the detaining authority ought

to have considered the representation made by the petitioner. When the petitioner has prayed for revocation of the order of detention, than the authority is supposed to consider the representation in totality of facts and circumstances of the case. The petitioner had initially applied for revocation of the order by making a written representation on 19.4.2002, but the same was rejected by the State Government.

6.3 This Court, while dealing with Spl.C.A. No.5177/2002 has considered certain aspects and it would be appropriate to refer relevant part of the observations made by this Court in the Oral Judgment dated 23.7.2002 while dealing with aforesaid petition, wherein, this Court has observed that :-

> "It is rightly argued that the detaining authority ought to have recorded satisfaction that the petitioner requires to be detained and his free movement may prejudice or disrupt the "public order". It is true that for a single offence or a dangerous act, a person can be detained. However, it is obligatory on the part of the detaining authority to get satisfied that unless the detention order is not passed, detenu would indulge in similar type of dangerous activities which would disrupt the "public order". It is submitted by ld. counsel for the petitioner that after appreciating the papers of the police case, prima facie, registered against the petitioner, the competent Court has granted bail to the petitioner. When the Criminal Court has accepted that discretion requires to be exercised and petitioner should be granted bail, then it would not be otherwise justified or proper to keep the petitioner in prison under the detention laws. Gravity of the offence as well as development of normalcy in the area where alleged incident had occurred, are both relevant facts. It is rightly submitted that this is the case wherein State of Gujarat should have revoked the order of detention after lapse of certain period from the alleged sole incident. For short, this Court feels that the continued detention of the petitioner in reference to the above set of facts, is bad and illegal and so on both these counts, the continued detention of the detenu requires to be held as bad-in-law and illegal."

7.1 Ld. AGP Mr. Kogje while resisting the petition, has submitted that in view of the ratio of the decision

of this Court in the case of Smt. Rohanbibi Mahommandkhan Pathan v/s State of Gujarat, 1990(2) GLH P.1, the order of the detention should be held valid. In the cited decision, the petitioner lady was found involved in the activities of bootlegging and she had challenged the legality and validity of the order of detention. Reliance is placed on the observations made by the Division Bench in para-16 of the decision wherein the Court has held that the subjective satisfaction arrived at by the detaining authority under Section 3 and under Section 9(2) of the PASA Act, requires to be appreciated on factual matrix of each case. In the cited decision, names of witnesses were not disclosed due to possibility of flaming up of communal riots. Satisfaction recorded by the authority and the reasons assigned for recording the subjective satisfaction was found valid. This decision would not help the State in any manner because the same is based on totally different set of facts.

7.2 The second decision relied on by the ld. AGP Mr. Kogje is in the case of Indersing Gulabsing Shikh v/s State of Gujarat, 1993(2) GCD 842 (Guj.). In the cited case, the detenu was found involved in the offence punishable under the Arms Act and said to have been indulged in violent activities constituting disturbance to the "public order". The petitioner detenu was found involved in 9 different cases as well as 4 different un-named persons have given their statements describing the activities of the petitioner and the detaining authority satisfied that the petitioner is a "dangerous person". Observations of this Court in reference to the arguments advanced by the ld. counsel appearing in the matter in para-9 of the cited decision, has been read over to the Court, wherein the Court has held that there are various categories of anti-social elements described in Section 3 of the PASA Act viz. dangerous person, bootlegger, persons indulged in immoral traffic and property grabbers and on facts, the Court found that petitioner Indersing is a "dangerous person". While in the present case, the petitioner is found involved in criminal case of communal violence and has no other criminal antecedents. So, this decision also would not help the respondent.

8.1 In view of the representation made by the petitioner himself through his counsel, there was an ample opportunity for the detaining authority to revoke the order of detention at any subsequent stage especially when it is claimed that there is normalcy in the city and in that case continued detention of the petitioner is not

warranted, otherwise reasons could have been assigned justifying the continuance of the detention. It is time and again said in more than one decision by the Apex Court that it is the duty of the detaining authority to consider the aspect of the revocation of the order of detention if prayed or in a changed circumstances. The petitioner has voluntarily declared before this Court, by filing a written undertaking and the ld. counsel for the petitioner has also made a statement before the Court that in the interest of smooth administration of the area by the police machinery, detenu shall not enter the area falling under Gaekwad Haveli Police Station for a period of two months.

8.2 Normally, while dealing with the petitions seeking relief of quashing of the order of detention and when the writ of habeas corpus is prayed for, the Court itself, unless in exceptional circumstances, should not impose any such restrictive conditions, but when the petitioner himself has voluntarily filed an undertaking to the effect that he shall not enter the area of Gaekwad Haveli Police Station for a period of two months, than with a view to do substantive justice, the undertaking filed by the detenu can be accepted. So, the same is accepted accordingly. The petitioner now shall be bound by the undertaking filed by him only with a view to help the police machinery in the area of Gaekwad Haveli Police Station. It is clarified that the continued detention is required to be quashed on its own merits and not on account of this undertaking filed by the petitioner. On such an undertaking, the order of detention cannot be turned down. So, in the changed circumstances, the Court feels that this petition should be allowed. The fact of filing of undertaking and imposition of restriction on the movement of the petitioner invited by the petitioner, in any way, should not be treated as a precedent and neither party before the Court in another such or similar petition shall be entitled to take the advantage or disadvantage of these findings/conclusions.

9. It is submitted that considering the number of events of communal riots where many citizens have sustained physical injuries as well as suffered property loss and in that set of circumstances, the authority might have thought it fit to detain certain number of persons, even innocent, but after establishment of normalcy, the order of revocation could have been passed by the authority on the representation. So, this is a case where without disturbing the validity of the order of detention, continued detention can be quashed or turned down and petitioner should be set at liberty.

10. Ld. AGP Mr. Kogje is correct in pointing out that as per the condition imposed by the competent Court while enlarging the petitioner on bail, he shall have to report to Gaekwad Haveli Police Station on every Monday. However, in view of the undertaking filed before this Court on 26.7.2002, it would not be possible for him to go to Gaekwad Haveli Police Station on every Monday. In this eventuality, Gaekwad Haveli Police Station can be intimated accordingly and simultaneously, the petitioner should initiate appropriate proceedings to get the aforesaid condition temporarily modified/altered from the Court concerned from where he has obtained bail. Directions accordingly. After the expiry of two months, he can and should get his presence marked with that police station.

11. For the reasons recorded in the oral judgment, petition is allowed to the extent that continued detention of the detenu pursuant to the impugned order of detention dated 15.4.2002 passed by the Police Commissioner, Ahmedabad City, against the detenu is hereby held to be illegal and bad in law and detenu is hereby ordered to be set at liberty forthwith if he is not required to be detained in any other case. Rule is made absolute accordingly. Direct service is permitted.

02.08.2002 [ C.K. BUCH, J ]
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